



QUEENSLAND
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Good Decision-Making Guide

Good decisions make good sense



Introduction



Today's community expects that public agencies will operate consistently and fairly and that government at all levels will have systems in place to ensure this happens.

However, decision-making in the public sector can be multi-faceted and complex. Furthermore, even a decision on a seemingly simple matter can have a serious impact on people in the community. Therefore, it is important that public agencies have policies and procedures to support and inform fair, sound and consistent decision-making.

This guide has been developed to assist public sector decision-makers to make good administrative decisions.



Skills, attitude and trust



Skills, attitude and trust

The quality of an administrative decision will depend on the decision-maker's knowledge, experience and integrity. Decision-makers must be able to gather and analyse relevant information, observe any legal requirements and properly apply any relevant policy. These skills can be improved through training and effective supervision providing constructive feedback. Feedback from people affected by a decision may also reflect on the quality of the decision and should not be ignored.



Having the right attitude can also have a direct impact on the decision-making process. An open, consultative approach is important, especially where the decision may adversely affect the interests of particular members of the community. Good interpersonal skills need to be employed during the process to achieve a positive outcome.

There are real benefits for an agency whose officers:

- take time to really understand the concerns of those affected, or potentially affected, by a decision
- respond promptly to communications from those people
- keep them informed of the status of the decision-making process
- advise them in a timely way of the decision and the reasons for the decision.

The agency's reputation as an open, accountable and fair organisation will be enhanced and the agency will be likely to receive fewer, well-founded complaints about its decisions.

Decision-makers must be able to gather and analyse relevant information, observe any legal requirements and properly apply any relevant policy.



Good decision-making guidelines



Stage 1: Preparing for the decision

Decision-makers need to prepare properly for a decision. This stage is critical, being the foundation of the decision-making process. If this stage is not handled well, it is unlikely the ultimate decision will be sound.

1. Identify and record the key issues

The first step in any decision-making process or investigation is to correctly identify the key issues. For example, if you have to decide whether an applicant should be granted a licence of some kind, you will need to identify the relevant criteria the applicant must meet. Getting this right will avoid potential difficulties later on in the process.

During this stage, you will need to consider:

- any relevant legislative provisions
- any relevant policies, standards and practice of your agency
- what information is available that may be relevant to the applicant's compliance with the criteria
- what information needs to be gathered to determine whether the applicant complies with the criteria
- the possible decisions you may make, and, if necessary, your delegated authority to make the decision.

You should also consider whether you have an actual or potential conflict of interest and, if so, deal with the conflict in accordance with your agency's code of conduct or standard practice.

Always ensure you record your assessment of the key issues.

2. Start and maintain a document trail

Accurate record keeping is an important component of good administrative practice. This concept is supported by the obligation imposed on public agencies by s.7 of the *Public Records Act 2002* to make and keep full and accurate records of their activities. The obligation covers all:

- oral communications, including telephone calls
- written communications, including emails and faxes
- events and actions, including internal or external meetings, that are relevant to the decision to be made.

Records should be made simultaneously or as soon as practicable following the communication, event or action to which they relate.



Good record keeping:

- improves decision-making by providing decision-makers with detailed information on which to base their decisions
- assists decision-makers to prepare a comprehensive statement of reasons if required
- enables an agency to establish how a particular decision was made, in the event that the decision is challenged or is the subject of external or internal review
- protects you and your agency from criticism by providing you with the means to explain why a certain decision was made
- enhances transparency in government by enabling agencies to respond meaningfully and efficiently to requests under the *Freedom of Information Act 1992*.

Therefore, good record keeping enhances accountability in government.

3. Read and understand your legislation

Clear legal authority must exist for an administrative decision that adversely affects a person's interests. Most decisions are made directly or indirectly under a power granted by legislation.

It is important that the legislation relevant to a decision is correctly interpreted and applied. Most legislation now contains objectives and/or guiding principles to assist with interpretation. There also may be cases decided by a court or tribunal that have clarified the interpretation and application of the relevant legislation.

If the meaning or application of the legislation is unclear, consider obtaining specific legal advice.

4. Check you have legal authority to make the decision

Legislation usually sets out who is authorised to make a decision. The general legal principle is that the authorised body or person must exercise powers and functions personally.

An exception to that principle is where a power can be exercised by a duly authorised delegate. The power of delegation may be contained in the legislation that confers the actual power to be exercised or in some other legislation.

The delegation must be in writing and signed by the person delegating the power¹.

If you are acting as a delegate, ensure you have an instrument of delegation signed by the person who holds the power being delegated or, as the case may be, signed on behalf of the body that holds the power. You should have ready access to the instrument whenever you are exercising the power.

Also ensure that the delegation given to you covers the specific decision-making power you are exercising and that it remains valid if the legislation conferring the power is amended.

¹ Section 27A(3) of the *Acts Interpretation Act 1954*

5. Identify and understand your agency's policies and practices

The term *policy* refers to written guidelines prepared to assist decision-makers to make lawful, fair and consistent decisions. The term *practice* refers to unwritten guidelines based on the way particular types of decisions have been made previously.

A policy must be consistent with the law and be reasonable. A practice must be consistent with the law and policy.

Policy should be interpreted so that its purpose or objective is achieved. Literal interpretations may lead to unintended results or wrong/unreasonable outcomes.

Well drafted policy should clarify the meaning and intended practical application of the relevant legislation. Policies should be reviewed and changed if they are not clear or are not doing the job they were created for.

Policy must not be inflexibly applied in decision-making. A decision-maker must have regard to, and evaluate the circumstances and merits of, the particular case. Therefore, a policy's application should not prevent proper consideration of a matter that may require a different outcome to the policy.

It is important that records of a decision should refer to any relevant policy and how it was applied to the particular facts and circumstances of the case.

To enhance consistency in decision-making, decision-makers should be made aware of situations in which policies have not been followed because to do so would have led to an unfair or incorrect outcome.

Under the *Freedom of Information Act 1992*² public agencies are required to make copies of their policy documents available for inspection and purchase by members of the public. If not, the Act provides that the policy can't be relied upon to the disadvantage of any person unaware of its existence.



6. Identify and understand the procedure you will follow

The term *procedure* refers to the steps involved in achieving the specific legislative or policy purpose. There are three types of procedures:

- *Statutory procedures* are the procedures set out in legislation.
- *General (common) law procedures* are the procedures developed by the courts to ensure fairness in administrative decision-making. These procedures are known as the rules of natural justice or procedural fairness.
- *Administrative procedures* are the procedures developed by agencies for circumstances where legislation doesn't set out the particular procedure to be followed.

7. Establish a decision-making timeframe

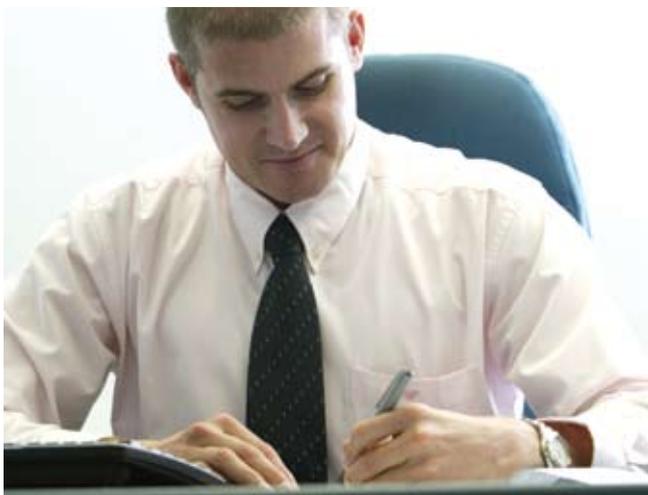
If the relevant legislation states that a decision or an action must be decided or completed within a particular time, then you must comply with that time limit. Also, your agency's written policy or procedure may specify a time within which to make your decision.

If the legislation doesn't specify a time within which you must take an action or make a decision, you must still take the action/make the decision as soon as possible³.

If an action or a decision is not referable to a power conferred by legislation and no policy or procedure specifies a time within which you must take the action or make the decision, you should take the action/make the decision within a reasonable time.

If this is not possible, consider advising those who will be affected by the decision of the delay. Otherwise it could give the impression that matters are being ignored or covered up.

Where the decision-making process is complex, consider setting milestones to be reached by particular dates and track the milestones through a record keeping system.



² Section 19(1)(b)

³ Section 38(4) of the *Acts Interpretation Act 1954*



Stage 2: Developing the decision

In developing the decision, the decision-maker should follow lawful and fair procedures, gather information relevant to the decision and give procedural fairness to people whose interests may be adversely affected by the proposed decision.

8. Follow procedures

Statutory procedures can be mandatory. If so, you must follow them in the decision-making process.

If no procedure is set out in the legislation, you have discretion as to the procedure to follow. However, the procedure followed must be reasonable in the particular circumstances.

Written agency (administrative) procedures can provide valuable guidance on the decision-making process in order to achieve consistency and fairness.

It is important that administrative procedures not be based solely on cost or convenience.

The gathering of relevant information is a crucial factor in good decision-making.

9. Gather and record all relevant information

The gathering of relevant information is a crucial factor in good decision-making.

Legislation may give a decision-maker express powers to gather information for a specified purpose, such as for an investigation. Even if your legislation doesn't give an express power to gather information, you may seek information from relevant sources, including from persons who may be affected by the decision.

Relevant information can be obtained from a variety of sources, such as your agency's own records, and other documents, other staff of your agency, discussions/interviews with other people and on-site inspections.

The key is to assess what information is relevant and disregard the rest. Relevant information is information or material that rationally or reasonably relates to the issue in question.

Ensure that you have gathered all relevant evidence that is reasonably available as this will provide the basis for your findings of fact.

If the legislation requires that a decision can be made only if certain facts/preconditions exist, then ensure you have gathered and recorded the evidence that establishes the existence of those facts/preconditions.

It is important that all information relevant to the decision to be made is fully and accurately recorded and maintained.

10. Observe Natural Justice

In simple terms, natural justice or procedural fairness means that a person who might be adversely affected by an administrative decision (the affected person) must be given a 'fair hearing' before the decision is made.

However, there are generally considered to be three aspects of natural justice:

1

The notice requirement

The notice to the affected person must identify the critical issues and contain sufficient information for the person to be able to participate meaningfully in the decision-making process.

2

The fair hearing rule

A fair hearing means that the affected person is given a reasonable opportunity to 'speak or respond' and also that the decision-maker genuinely considers the affected person's submission in making the decision.

3

The lack of bias rule

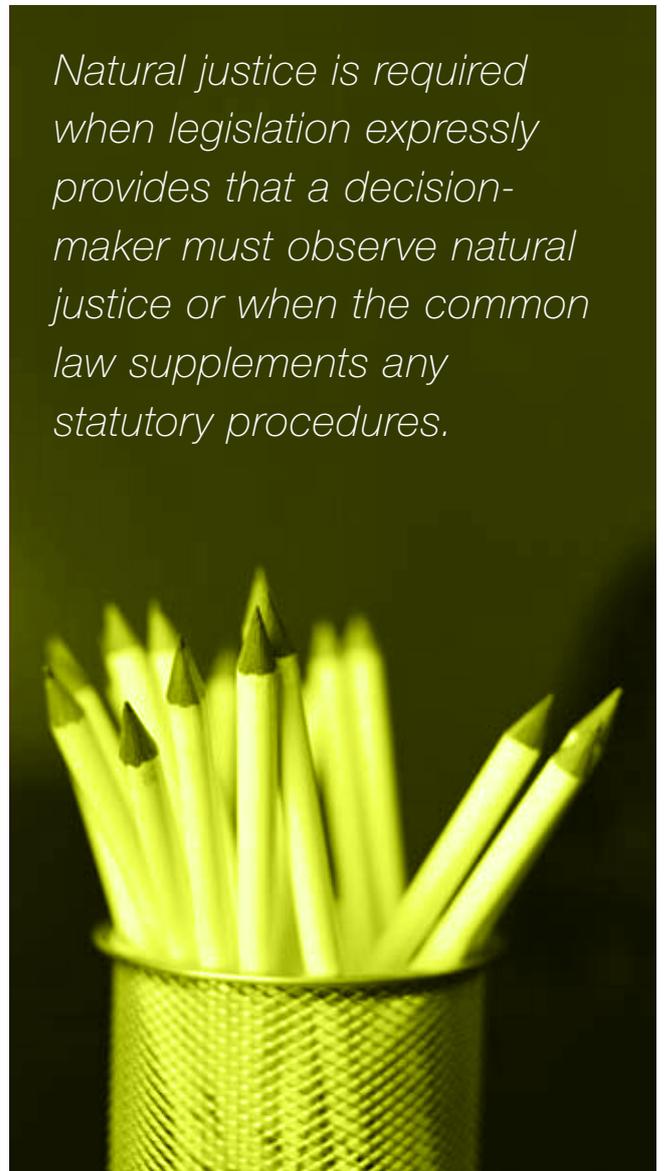
The person making the decision must act impartially in considering the matter. Bias is a lack of impartiality for any reason and may be in favour of or against the affected person. It may arise from the decision-maker having some financial or other personal interest in the outcome of the decision (conflict of interest), or giving the impression that they have prejudged the issue to be decided (prejudgement).

Bias can be actual or apprehended. Apprehended (or the appearance of) bias is judged by whether a fair-minded observer properly informed as to the facts or the nature of the proceedings or process might reasonably apprehend that the decision-maker might not bring an impartial or unprejudiced mind to the resolution of the issue.

Natural justice is required when legislation expressly provides that a decision-maker must observe natural justice or when the common law supplements any statutory procedures. At common law, natural justice is required when a proposed decision may affect a person's rights, interests or legitimate (reasonable) expectations.

So in cases where your decision may adversely affect any person, give them a reasonable opportunity to comment on the critical issues, and information or material that may be unfavourable to them, before you make your decision. Also ensure you do not have a conflict of interest in the outcome and that you do not act in a way that suggests you are biased in favour of or against any person who will be affected by your decision.

Natural justice is required when legislation expressly provides that a decision-maker must observe natural justice or when the common law supplements any statutory procedures.



Stage 3: Making the decision



Stage 3: Making the decision

In making the decision, the decision-maker, after ascertaining the material or relevant facts, should correctly apply the relevant law to the facts and then reasonably exercise their discretion.

11. Find and record the facts

All findings of fact must be supported by relevant evidence. If legislation requires that particular facts must exist before you can make a decision, then make sure that you have obtained sufficient evidence to establish those facts.

After you have gathered the evidence, you must evaluate it to determine what is relevant to the findings of fact you have to make. All relevant evidence must be considered, not just the evidence which supports the finding you may want to make.

Whether the evidence you have gathered is sufficient to prove a fact must be assessed in accordance with a legal standard. Unless legislation requires otherwise, the civil standard (proof on the balance of probabilities) applies to administrative decisions. The strength of evidence necessary to establish a fact on the balance of probabilities may vary according to the seriousness of the issues involved, that is, the more serious the issue, the stronger the evidence required.

Ensure you record all findings of fact and your reasoning for them.

12. Apply the law to the facts

Before you can apply the law to the particular facts of the case before you, it's important that you have correctly interpreted the legislation.

The Acts Interpretation Act states that:

In the interpretation of a provision of an Act, the interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation⁴.

Therefore, it is important that, as a decision-maker, you start by gaining an understanding of the purposes (or objects) of the legislation, the way in which the legislation seeks to achieve those purposes and how the provision you are applying fits into the overall scheme of the legislation. Legislation should be read as a whole.

The law to be applied in making your administrative decision may be contained in an Act of Parliament or in subordinate legislation (e.g. a regulation) or may stem from the general (common) law, or from a combination of sources.

Previous court and tribunal decisions can provide legal authority or guidance on the meaning and/or application of the law to factual situations. If you are unclear about whether or not a previous decision binds you or is relevant, consider obtaining legal advice.

However, be aware that unlike applicable decisions of courts and tribunals, legal advice is only an opinion and, therefore, is not binding.

⁴Section 14A(1)

*Policies are not law,
but provide guidance
on how you should
exercise your
discretion.*



13. Reasonably exercise your discretion

The nature and scope of a decision-maker's discretion depends on the particular provisions in the legislation and, in the case of a power being exercised under delegated authority, on the terms of the instrument of delegation.

If the legislation says that a power 'may' be exercised, it is up to the decision-maker whether or not to exercise the power, following proper consideration of all relevant issues and the particular circumstances of the case. However, the decision to exercise or not exercise the discretion must be lawful and reasonable in the circumstances.

In reaching your decision, you can consult with other officers and have regard to agency policy. However, you must act independently in exercising your discretion according to your own assessment of the particular case before you. That is, your decision must be made without any direction from another person.

Legislation may say that certain matters must be taken into account in making a decision. If so, then those matters must be considered.

However, where the legislation does not specify the matters to be taken into account, you should consider the underlying purpose of the decision-making power and any other matters relevant to achieving that purpose. Your agency's policies and previous decisions on similar cases may provide guidance. There may also be relevant court or tribunal decisions and legal advice available.

Ensure you take into account relevant matters and disregard irrelevant ones.

Where legislation specifies matters to be considered in making a decision, it may also indicate the weight to be given to those matters, but this is rare. In practice, the decision-maker will usually have to determine the weight to be given to competing factors. So be clear about which factors you put more weight on in reaching your decision and why.

You should also be able to clearly identify the critical issues in your decision (that is, the issues on which your decision turns). You can do this by considering what issues would need to change for you to make the opposite decision. It is important that sufficient evidence exists to establish each of these issues.

Ensure you record the matters you have taken into account, as well as your reasons for giving more weight to some matters than others. If the affected person has raised matters you consider irrelevant, make a record of these matters and why you consider them irrelevant.

Consistency is an important attribute of good decision-making. However, if you are intending to follow a previous decision, you must ensure that its circumstances are sufficiently similar to those of the decision you have to make.

Also, as mentioned earlier, policies are intended to provide guidance on how you should exercise your discretion but they must not be applied inflexibly. Therefore, you must always take into account the circumstances of the particular case and not follow the policy if this will lead to an unfair or otherwise incorrect decision.

Finally, only use powers for the purpose they are given. You cannot use a power for a different purpose, even if you believe that it is justified or necessary in the public interest.



Stage 4: Communicating the decision

It is important that people affected by a decision of a public sector agency understand the reasons for the decision.

Effective communication of decisions and reasons can assist in preventing complaints. Even a correct decision can lead to a complaint if it is badly communicated.

14. Give meaningful and accurate reasons

The purpose of giving reasons for a decision is to enable the person affected by the decision:

- to understand why the decision was made
- to decide whether to seek a review of, or to appeal against, the decision and to identify the grounds for the review or appeal.

To meaningfully and accurately communicate your decision, it is critical that:

- you have good records of the decision-making process
- you clearly understand the decision itself, the reasons for the decision and the consequences of the decision.

Legislation increasingly requires that reasons must be given in writing for particular decisions. Under the Acts Interpretation Act⁵, if an Act requires that written reasons be given for a decision, the document giving the reasons must also:

- set out the findings on material questions of fact
- refer to the evidence or other material on which those findings were based.

Even if the law authorising you to make the decision does not require you to give written reasons with your decision, the affected person may be able to request a statement of reasons under the *Judicial Review Act 1991*⁶. In this Act, the term 'reasons', in relation to an administrative decision, is defined as⁷:

- findings on material questions of fact
- a reference to the evidence or other material on which the findings are based, as well as the reasons for the decision.

Even where there is no legislative requirement on the decision-maker to give reasons, giving reasons is good administrative practice in that it promotes fairness, transparency and accountability in decision-making.

Giving reasons can be counterproductive if the reasons are not meaningful and accurate. Explain the issues you considered and why specific material was accepted or rejected. Take particular care to genuinely address the affected person's major arguments.

A person adversely affected by the decision should be notified of any statutory review or appeal process at the time they are notified of the decision, including:

- the time allowed to apply for the review/appeal
- how to apply for the review/appeal.

A person who expresses dissatisfaction with a decision should be provided with details of the agency's internal complaint management process.

⁵Section 27B

⁶Section 32

⁷Section 3

Conclusion

Many public sector officers have significant and wide powers to make decisions that affect the interests of members of the community. Although there have been substantial changes in public administration and administrative law in recent years, the basic principles of fairness, objectivity, thoroughness and compliance with the law remain.

Effective decision-making is a skill that comes more easily to some than others. Training can improve skills in this field.

You are more likely to make the correct decision if you:

- act fairly, reasonably and in good faith
- obtain, consider and act in accordance with all available relevant information
- are open and respectful in your dealings with those affected or potentially affected by your decision
- try to resolve concerns as informally and quickly as possible.

Having made the correct decision, don't fall at the final hurdle. Make sure you effectively communicate your decision and the reasons for your decision to those affected by it.



Training offered by the Queensland Ombudsman

The Queensland Ombudsman conducts Good Decisions Training, a program designed to help officers in the public sector make better decisions. The training is suitable for all public sector decision-makers, including supervisors and managers.

The Queensland Ombudsman also conducts Complaints Management Training, a program that helps officers who deal with complaints, including officers who internally review complaints, to fairly and efficiently manage and investigate complaints.

Visit www.ombudsman.qld.gov.au/training for further information or to make a booking.

References



We hope the information contained in this guide will assist your agency's approach to administrative decision-making.

Much of the information has been influenced by our experiences of working with agencies to help them improve processes and the following other sources:

- *Acts Interpretation Act 1954*
- *Anti Discrimination Act 1991*
- Electoral and Administrative Review Commission (1991) *Issues Paper No. 15 – Codes of Conduct for Public Officials*. Brisbane, Queensland
- *Freedom of Information Act 1992*
- *Judicial Review Act 1991*
- *Legislative Standards Act 1992*
- *Ombudsman Act 2001*
- Queensland Government (2001) *Information Privacy Principles*



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